STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 29, 2005
v BILAL CHAABAN, Defendant-Appellant.	No. 253513 Wayne Circuit Court LC No. 03-008585-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v GILBERTO JUAREZ, Defendant-Appellant.	No. 253751 Wayne Circuit Court LC No. 03-008585-02

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

PER CURIAM.

Underlying this consolidated appeal, defendant Bilal Chaaban was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b), two counts of assault with intent to murder, MCL 750.83, two counts of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b after a joint jury trial. The court vacated both counts of second-degree murder, and sentenced defendant Chaabaan to life in prison for the felony murder convictions, twenty to forty years' in prison for the assault with intent to murder convictions, and two years' imprisonment for the felony-firearm conviction.

The jury also found defendant Gilberto Juarez guilty of two counts of assault with intent to murder, MCL 750.83, two counts of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The court sentenced defendant Juarez to twenty to forty years' in prison for the assault with intent to murder convictions, twenty to forty years' in prison for the second-degree murder convictions, and two years' imprisonment for the felony-firearm conviction. Both defendants appeal their jury trial convictions as of right. Because we do not find any of their arguments persuasive, we affirm.

The prosecution arose out of the murders of Angela Ciazza and Lowell Clark. During the early morning of April 13, 2003, defendant Chaaban was walking home following a night of drinking with defendant Juarez when he encountered Ciazza who was taking a walk in a neighborhood park near her home. An altercation ensued. When the exchange became loud, James Duprie ran out of Ciazza's home toward defendant Chaaban and Ciazza. Ciazza stated that defendant Chaaban tried to attack her and Duprie began punching defendant Chaaban. There is conflicting testimony regarding whether Clark was also involved in the fight at the park. Defendant Chaaban ran away from the park and used his cellular phone to call defendant Juarez. Defendant Chaaban told defendant Juarez that he had been attacked by gang members and asked him to bring him a gun. At trial, defendant Chaaban testified that he had been beaten in June 2002 by Clark and other gang members and that he was fearful for his home and family.

Defendant Juarez picked up defendant Chaaban in his truck and provided him with an AK47 assault rifle. Defendants drove to the street where Ciazza lived. Ciazza, Duprie, and Clark were on the porch talking loudly which prompted Jessica Clark, the babysitter for Ciazza's twin babies, to exit the house and come outside. Defendants arrived at the house, some words were exchanged, and Ciazza threw a bottle at the truck. Defendant Chaaban got out of the truck with the gun and when he reached the sidewalk, he shot at the door of the house. Ciazza said she was shot, and she, Duprie, Clark, and Jessica Clark ran into the house. Defendant Chaaban followed. Duprie and Clark ran into the basement. Jessica Clark initially hid in the kitchen and saw defendant Chaaban walk by and proceed downstairs into the basement. Defendant Chaaban entered the basement and shot Lowell who had tried to hide under the stairs and shot Ciazza's dog. Duprie stayed hidden behind a washer. Jessica Clark ran upstairs and hid in a closet. Defendant Chaaban then walked back up the stairs and fired more shots, one of which traveled through the floor and hit the wall near the washer where Duprie remained hiding. Defendant Chaaban then left the house carrying the gun, got back in defendant Juarez's truck, and defendant Juarez drove away with the lights off. The police and EMS arrived at the scene and found Ciazza dead on the main floor of the house and Lowell dead in the basement.

Defendant Juarez dropped off defendant Chaaban and drove home. Defendant Chaaban called his friend Roberto Castillo who met up with defendant Chaaban at a laundry mat and walked with him to a nearby motel where defendant Chaaban remained for a few hours. In the morning, Castillo, and Mouad Shohatee, another friend of defendant Chaaban, threw the gun and four clips of ammunition into a dumpster. Defendant Chaaban maintained to his friends that he had been jumped and that he had to shoot in self-defense because his attackers knew where he lived. Castillo and Shohatee talked to defendant about turning himself in to the police.

An autopsy revealed that Ciazza died as a result of two gun shot wounds and found evidence of close range firing. Lowell's cause of death was also multiple gunshot wounds, and the autopsy revealed five gunshot wounds in total. There was no evidence of close range firing on Lowell.

Docket No. 253513

In docket number 253513, defendant Chaaban first argues that the trial court erred when it did not allow him to discharge his counsel and represent himself at trial. This Court reviews for an abuse of discretion the trial court's decision to permit defendant to represent himself. *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976); *People v Hicks*, 259 Mich App

518, 521; 675 NW2d 599 (2003). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Several requirements must be met before a defendant may proceed in propria persona. *People v Russell*, 471 Mich 182, 190-191; 684 NW2d 745 (2004). First, a defendant's request to represent himself must be unequivocal. *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). Second, the trial court must determine that the defendant's assertion of his right is knowing, intelligent, and voluntary. *Id.* Third, the trial court must determine that the defendant's self-representation will not disrupt, inconvenience or burden the court. *Id.* Fourth, the trial court must comply with the requirements of MCR 6.005.[1] *Id.*

In this case, defendant Chaaban stated on the record on the first day of trial that he wanted to discharge his attorney and represent himself saying that he had "a different way of seeing things." As required, the trial court then properly discussed the risks of self-representation with defendant Chaaban. The trial court also asked defendant Chaaban about his general competence as well as his legal competence within this exchange. We note that although a defendant's general competence is relevant to the determination whether he is knowingly and intelligently asserting his right to self-representation, his legal competence is not. *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994). Therefore, those questions that directly inquired about defendant Chaaban's legal competence should have been irrelevant to the trial court's ultimate decision regarding self-representation.

In the middle of the colloquy between defendant Chaaban and the trial court, the equivocalness of defendant's request became less resolute. Defendant Chaaban went from certainty when he stated that he "could defend [him]self with the truth" to a probability that he "could probably effectively handle [him]self" during trial. Defendant Chaaban then finally concluded, at the close of the exchange with the trial court, "[w]ell, I don't know what to do." The trial court then denied defendant Chaaban's motion. Plainly, defendant's request to represent himself changed from unequivocal to equivocal after listening to the court's discussion about the risks of self-representation and its inquiry regarding defendant Chaaban's competence. Since a defendant's request to represent himself must be unequivocal, the trial court did not err when it refused defendant Chaaban's request to represent himself. *Williams, supra,* 470 Mich 642.

Defendant Chaaban next argues that the trial court committed an error requiring reversal when it admitted codefendant Juarez's statement to police because it was a statement by a non-testifying codefendant that inculpated defendant Chaaban. Because defendant Chaaban failed to object to the admission of co-defendant Juarez's statement, we review this unpreserved

[1] MCR 6.005 requires that a court may not permit an initial waiver of counsel without first advising the defendant of the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risks of self-representation, and without offering the defendant the opportunity to consult with a lawyer.

constitutional claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

A codefendant's confession is so "powerfully incriminating" that its presentation into evidence, apart from an opportunity to cross-examine the declarant, "intolerably compound[s]" the unreliability of the confession and is contrary to the protections afforded in the Confrontation Clause. *Bruton v US*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968). Therefore, to admit testimonial evidence against a defendant, the Confrontation Clause requires the unavailability of a witness and a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 1374; 158 L Ed 2d 177 (2004).

Here, codefendant Juarez gave a statement to police implicating defendant Chaaban in the instant crimes. Therefore, codefendant Juarez's statement was testimonial evidence. See *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004). Codefendant Juarez was not subject to cross-examination because he did not testify at trial. Accordingly, we conclude that the trial court violated defendant Chaaban's right of confrontation by admitting the testimonial statement of a non-testifying codefendant into evidence.

However, violations of the Confrontation Clause are reviewed in light of plain, outcome determinative error. *McPherson, supra*, 263 Mich App 131-132. To establish that his substantial rights have been affected, a defendant must show prejudice by demonstrating that the error affected the outcome of the proceedings. *Carines, supra* at 460 Mich 763. Here, codefendant Juarez's statement was not the primary evidence supporting defendant Chaaban's convictions. Defendant Chaaban's own prior statement and trial testimony contained admissions to shooting the victims. Duprie and Jessica Clark testified to observing defendant Chaaban get out of codefendant Juarez's truck, shoot at the house, and then enter the house shooting at the victims. Both Castillo and Shohatee testified that defendant Chaaban told them he had shot the victims and that they had helped him dispose of the gun used in the crime as well as additional ammunition. There was overwhelming evidence of defendant Chaaban's guilt apart from codefendant Juarez's statement. Given the eyewitness accounts of the shooting and defendant Chaaban's own inculpatory statement and testimony, we conclude that the constitutional error was not outcome determinative. *McPherson, supra.*

Finally in docket number 253513, defendant Chaaban argues that the evidence presented at trial was insufficient to convict him of felony murder based on home invasion. A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003).

Felony murder consists of the killing of a human being with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Lee*, 212 Mich App 228, 258; 537 NW2d 233 (1995). The underlying felony involved in this case is home invasion, a felony enumerated in MCL 750.316(1)(b). The elements of first-degree home invasion are as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
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> (a) The person is armed with a dangerous weapon.
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> (b) Another person is lawfully present in the dwelling. [MCL 750.110a(2); see also *People v Silver*, 466 Mich 386, 390; 646 NW2d 150 (2002).]

Defendant Chaaban claims that there was insufficient evidence to support a conviction for felony murder based upon home invasion because there was no evidence that he intended to commit an assault when he entered the house. The record evidence directly contradicts this assertion however, because defendant Chaaban admitted to shooting at the door of the house with an AK47 even before he entered the home in pursuit of the victims. While defendant Chaaban asserts that he did not have the requisite intent to commit assault when entering the house, the statute requires only that (1) defendant entered the house without permission; (2) defendant committed an assault while entering, being present in, or exiting the dwelling; and (3) defendant was either armed with a dangerous weapon, or another person was lawfully present in the dwelling.

Upon review de novo, we find, viewing the evidence in a light most favorable to the prosecution, that there was sufficient evidence to prove all of the elements of first-degree felony-murder premised on first-degree home invasion. See *Hunter*, *supra*, at 6; *Knowles*, *supra*, 256 Mich App 58. First, defendant admitted that he shot at the door of the house and entered the dwelling without permission. Second, defendant testified that after entering the house he continued to shoot and actually shot and killed both Ciazza and Lowell. This evidence, most of which was defendant's own testimony, satisfies the elements of first-degree home invasion. It is sufficient to show that defendant (1) entered Ciazza's house without permission; (2) while inside the dwelling, shot and killed two people; and (3) defendant was armed with a dangerous weapon, an AK47, and aside from the other victims, Ciazza's two children were lawfully present in the dwelling at the time of the incident. We conclude that, based on the above discussed evidence, a reasonable jury could convict defendant of first-degree felony murder premised upon first-degree home invasion. See, *Id*.

Docket No. 253751

In docket number 253751, defendant Juarez first argues that the trial court erred when it refused to instruct the jury on involuntary manslaughter when a rational view of the evidence supported that instruction. Defendant Juarez preserved this argument when he objected to the trial court's refusal to instruct the jury on involuntary manslaughter. MCR 2.516(C); *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004). We review de novo claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), remanded 467 Mich 888, on remand 256 Mich App 674 (2003). An instruction need only be given if it is

supported by the evidence, and a trial court has discretion to determine whether an instruction is applicable. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). A lesser offense is necessarily included if its elements are completely contained in the greater offense. *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003), citing *Cornell, supra*, at 356. With respect to voluntary and involuntary manslaughter, the Michigan Supreme Court has held:

> [T]he elements of voluntary and involuntary manslaughter are included in the elements of murder. Thus, both forms of manslaughter are necessarily included lesser offenses of murder. Because voluntary and involuntary manslaughter are necessarily included lesser offenses, they are also 'inferior' offenses within the scope of MCL 768.32. Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence. [*Mendoza, supra*, at 541, citing *Cornell, supra*, at 357.]

Our Supreme Court also recently addressed the offense of involuntary manslaughter as it relates to other homicides, and summarized that:

> [I]t must be kept in mind that 'the sole element distinguishing manslaughter and murder is malice,' and that '[i]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: 'Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.'' If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter. [*People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004) (internal citations omitted).]

Defendant Juarez was prosecuted in this case under a theory of aiding and abetting codefendant Chaaban. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). The evidence clearly showed that defendant Juarez provided codefendant Chaaban with the AK47 and ammunition used in the shootings, drove him to the scene of the crime, watched him shoot at the door of the house, waited for him to return to the vehicle, fled the scene, and then dropped him off. Our review of the record reveals that there was absolutely no evidence to support a claim in this case that codefendant Chaaban did not intend to shoot and kill the victims and that rather, the deaths were caused by negligence, intent to injure, or some lesser mens rea thereby necessitating instruction on involuntary manslaughter. On the contrary, the facts of this case are largely not in dispute, and show that codefendant Chaaban admitted to firing the gun at the door of the house, pursuing the victims into the house and continuing to fire at them causing two deaths. For these reasons, a rational view of the

evidence did not support an instruction for involuntary manslaughter. The trial court did not abuse its discretion when it refused to give the requested instruction. *Ho, supra*, 231 Mich App 189.

Defendant Juarez next argues that there was insufficient evidence to support his convictions for second-degree murder or assault with intent to murder. A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Hunter, supra*, 466 Mich 6; *Knowles, supra*, 256 Mich App 58.

Again, a person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. *Mass, supra*, 464 Mich 627-628. This Court set forth the following requirements necessary to prove a crime under an aiding and abetting theory:

> To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001).]

The elements of second-degree murder include:

> '(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification of excuse.' *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998).
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> ***
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> The element of malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.' *Id*. at 464. Malice for second-degree murder can be inferred from evidence that the defendant 'intentionally set in motion a force likely to cause death or great bodily harm.' *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences. *Goecke, supra* at 466. [*People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).]

In the present case, the evidence, viewed in a light most favorable to the prosecution, is sufficient to support a second-degree murder conviction. The evidence clearly showed that defendant Juarez supplied codefendant Chaaban with the AK47 and ammunition used in the shootings, drove him to the scene of the crime, watched him shoot at the door of the house, observed him enter the house in pursuit of the victims with the gun, waited for him to return to

the vehicle, fled the scene, and then dropped him off. This evidence, viewed in a light most favorable to the prosecution, is sufficient to establish malice, as there was an intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm through codefendant Chaaban's act of shooting the victims. These acts establish defendant's participation as an aider or abettor in the crime of second-degree murder. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational jury could find that the essential elements of second-degree murder on an aiding and abetting theory were proved beyond a reasonable doubt.

Further, the evidence, viewed in a light most favorable to the prosecution, is sufficient to support convictions for assault with intent to commit murder. The elements of assault with intent to commit murder are: (1) an assault; (2) with an actual intent to kill; (3) which, if successful, would make the killing murder. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). The intent to kill may be proven by inference from any facts in evidence, and the intent may exist without directing it at any particular victim. *Id*. at 658. Defendant Juarez argues that the evidence negates any intent to kill on his part. To the contrary, viewing the evidence in the light most favorable to the prosecution, we conclude that defendant Juarez had an intent to kill when he provided codefendant Chaaban with an AK47, ammunition, drove codefendant Chaaban to the scene of the crime, and watched him exit the vehicle shooting. Thus, defendant Juarez's knowledge that codefendant Chaaban intended to shoot and kill the victims can be inferred beyond a reasonable doubt. *Id*.

Defendant Juarez also argues that the prosecutor's failure to timely comply with discovery denied him a fair trial. We review a trial court's decisions regarding both the admission of evidence and a determination of an appropriate remedy for a discovery violation for an abuse of that discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

Defendant Juarez asserts that the prosecution withheld an important piece of evidence when it did not provide the transcripts of witness Stacey Longrie's pre-trial testimony pursuant to an investigative subpoena. A criminal defendant's due process rights to discovery may be implicated if the defendant served a timely request on the prosecution and material evidence favorable to the accused is suppressed, or the defendant made only a general request for exculpatory information or no request and exculpatory evidence is suppressed. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). Suppression by the prosecution of evidence requested by and favorable to the accused violates due process if the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *People v Banks*, 249 Mich App 247, 254-255; 642 NW2d 351 (2002). "Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998). "A 'reasonable probability' is 'a probability sufficient to undermine confidence in the outcome.'" *Id*.

A review of the record reveals that the prosecutor apparently could not find Longrie at the start of trial, however, was able to locate her in the middle of trial. At that point it was discovered that the discovery packet provided to the defense prior to trial included a statement written by Longrie but did not include eighteen pages of testimony given pursuant to an

investigative subpoena. The prosecutor stated that it was an inadvertent omission. The trial court ruled that the prosecutor could not use the prior testimony in any way during trial including impeachment or rehabilitation. Longrie did testify at trial, and the record reflects that the prosecutor provided Longrie's pre-trial testimony given pursuant to the investigative subpoena to the defense sometime before Longrie left the witness stand.

Although there appears to have been a discovery violation, we find no error requiring reversal. The evidence at issue was disclosed to the defense during trial and the trial court prohibited the prosecution from using the testimony during trial. Defendant Juarez's complaint is therefore not that the evidence was not disclosed, but instead that it was not timely disclosed. In light of the strength of the evidence in this case as discussed above, we cannot conclude that had the evidence at issue been earlier disclosed, there is a reasonable probability that the result of the proceeding would have been different. *Banks, supra,* 249 Mich App 255.

Moreover, when determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance. *Banks, supra,* 249 Mich App 252. The trial court appropriately balanced these interests in providing defendant Juarez a remedy for the undisclosed evidence when the court did not allow the evidence to be used for any purpose at trial. Any discovery violation appears to have been inadvertent and was cured during trial. We cannot conclude that the delayed disclosure of the evidence at issue rendered the trial fundamentally unfair. *Id*. at 254-255.

Finally, defendant Juarez has filed a supplemental brief pursuant to Administrative Order No. 2004-6 (Standard 4) replacing Administrative Order No. 1981-7 (Standard 11). Defendant raises only one issue in his late-filed brief. Defendant Juarez argues that his statement to police should have been suppressed at trial because it was coerced by a promise of leniency. This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). Although this Court engages in a review de novo of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker*[2] hearing unless those findings are clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). "A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court has made a mistake." *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000).

A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Daoud, supra,* 462 Mich 632-639. A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, *Daoud, supra,* at 633, and must be the product of an essentially free and unconstrained choice by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *Daoud, supra,* at 634. In *Cipriano, supra,* at 334, our Supreme

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Court set forth a nonexhaustive list of factors that should be considered in determining the voluntariness of a statement:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

Furthermore,

> [n]o single factor is necessarily conclusive on the issue of voluntariness, and 'the ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.' [*People v Akins*, 259 Mich App 545, 564-565; 675 NW2d 863 (2003).]

Defendant Juarez contends that the police coerced his statement by telling him that he would only be charged with a gun offense if he spoke to the police about his role in the murders. Defendant made the same argument before the trial court. The trial court found that it could not accept defendant Jaurez's definition of the "promise" offered to him by the police as "rational and reasonable." After reviewing the record, while defendant Juarez asserts that he was coerced into making his statement, we conclude that there is no evidence to support his assertion other than his own testimony. "The trial court is in the best position to assess the crucial issue of credibility." *Akins, supra*, 259 Mich App 566. Additionally, before defendant made his statement, he signed a document setting forth his constitutional rights, and indicated that he understood those rights.

Defendant Juarez also argues that there was evidence that he had been drinking and that he was tired and falling asleep when he was interrogated by the police. There was evidence presented during the *Walker* hearing about defendant Juarez's state of mind and physical condition during the interrogation. The trial court considered the evidence and found that defendant Juarez had decided he "better remain alert and awake" and was "thinking clearly." The trial court also stated that the police did not indicate defendant Juarez had any difficulty listening or following directions, and did not appear confused. In fact there was testimony that defendant Juarez was cooperative with police. After reviewing the record, we are not left with a definite and firm conviction that the trial court erred when it made factual findings regarding defendant's mental and physical states during his interrogation and concluded that defendant Juarez voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. As such, we will not disturb the trial court's factual findings. *Daoud, supra*, 462 Mich 629. In sum, given the circumstances surrounding defendant Juarez's waiver of rights and written statement and the

trial court's assessment of defendant's credibility and physicality, we conclude that the trial court did not err in denying defendant Juarez's motion to suppress his statement.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio